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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/976,646	10/11/2001	Loren R. Pickart	15672-000710	2075
20350	7590	11/26/2003	EXAMINER	
TOWNSEND AND TOWNSEND AND CREW, LLP TWO EMBARCADERO CENTER EIGHTH FLOOR SAN FRANCISCO, CA 94111-3834				TELLER, ROY R
		ART UNIT		PAPER NUMBER
		1654		

DATE MAILED: 11/26/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	09/976,646	PICKART, LOREN R.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Roy Teller	1654	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 11 October 2001.
- 2a) This action is **FINAL**.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-16 is/are pending in the application.
- 4a) Of the above claim(s) 11,12 and 16 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-10 and 13-15 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. §§ 119 and 120

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) All    b) Some \* c) None of:  
1. Certified copies of the priority documents have been received.  
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

- 13) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.  
a) The translation of the foreign language provisional application has been received.
- 14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

#### Attachment(s)

- 1) Notice of References Cited (PTO-892)                    4) Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.  
2) Notice of Draftsperson's Patent Drawing Review (PTO-948)                    5) Notice of Informal Patent Application (PTO-152)  
3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_.                    6) Other: \_\_\_\_\_

## **DETAILED ACTION**

Applicant's election of Group I, claims 1-15, in the September 3, 2003 communication, as well as Applicant's election of the ionic species of Copper II and the peptide of a hydrolyzed soybean peptide is acknowledged, which Applicant states reads upon claims 1-10 and 13-15. Please note that upon further consideration, the election of the type of metal ionic species as well as the type of natural peptide (i.e., not a chemically synthesized peptide such as recited in claims 11 and 12) is hereby withdrawn. In addition, Applicant's traversal with respect to electing a particular peptide sequence is deemed persuasive and is hereby withdrawn.

Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP 818.03(a)).

Accordingly, claims 11 and 12 (as well as non-elected claim 16) are withdrawn as being drawn to non-elected subject matter. Claims 1-10 and 13-15 are presented for examination on the merits.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-6 and 13-15 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 is rendered vague and indefinite by the phrase “ionic-peptide complex” because this phrase fails to adequately define this essential limitation of the disclosed/ claimed invention (see, e.g., MPEP 2172.01). It is clear from the demonstrated teachings of the instant specification that the peptide within the “ionic metal-peptide complex” is present as a hydrolyzed (digested) peptide (such as a peptide prepared in the manner recited in any one of claims 7-10) so as to provide the desired functional effect(s) instantly claimed and/or disclosed. As such, this essential limitation needs to be recited in the independent claim language itself. Please note that although the claims are interpreted in light of the specification, critical limitations from the specification cannot be read into the claims (see, e.g., *In re Van Guens*, 988 F.2d 1181, 26 PSPG2d 1057 (Fed.Cir. 1991)). Accordingly, without the recitation of the type of demonstrated peptide within the “ionic metal-peptide complex” (i.e., --a hydrolyzed peptide—or a — digested peptide--), the claims do not adequately define the instant invention.

All other cited claims depend directly or indirectly from rejected claims and are, therefore, also rejected under USC 112, second paragraph for the reasons set forth above.

***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-10 and 13-15 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of U.S. Patent No. 5,382,431 in view of claims 1 and 3-7 of U.S. Patent No. 5,888,522. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claimed invention of US '431 is drawn to accelerating wound healing via topically applying an effective amount of an ionic metal-peptone (peptide) digest (hydrolyzate) thereto, whereas the instant claims are drawn to a method of remodeling blemished skin via topically applying an effective amount of a ionic metal-peptide (peptone) hydrolyzate (digest) thereto. It is well accepted in the medical art that skin blemishes read upon a type of skin wound and, therefore, it would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to treat skin blemishes (wounds) via the claimed method of US '431. It would also have been obvious to one of ordinary skill in the art to prepare the ionic metal-peptone digest used in the US

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‘431 claims via the preparation methods beneficially disclosed in US ‘522 (see entire document including claims). The adjustment of particular conventional working conditions (e.g., digesting the peptide via one of various commonly employed, art-recognized techniques- such as those instantly claimed), is deemed merely a matter of judicious selection and routine optimization which is well within the purview of the skilled artisan.

Thus the claims are considered to be obvious variations (by claim terminology) of using the same product- and not patentably distinct. In view of the forgoing, the current invention is an obvious variation of the invention claimed in U.S. Patent No. 5,382,431 in view of U.S. Patent No.5,888,522.

### ***Conclusion***

All claims are rejected.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Roy Teller whose telephone number is (703)305-4243. The examiner can normally be reached on Monday-Friday from 5:30 am to 2:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Brenda Brumback, can be reached on (703) 306-3220. The fax phone number for the organization where this application or proceeding is assigned is (703)305-3014.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703)308-0196.

RT  
1654  
11/20/03

KT



CHRISTOPHER R. TATE  
PRIMARY EXAMINER